c. All character issues against SBB were resolved.

170. In its comments to Reading's motion for summary decision of the lack of candor issue, the Enforcement Bureau suggested that the negative response to Question 7(d)'s inquiry, whether "the applicant or any other party to this application has an interest in . . . a broadcast application in any Commission proceeding which left unresolved character issues against the applicant," was false because, as a result of the Religious Broadcasting settlement, the SBB real-party-in-interest issue was never "resolved." That argument is without merit. Specifically, the Review Board's decision affirming the ALJ's denial of integration credit to SBB stemming from the real-party-in-interest issue finally resolved that issue when SBB elected not to file an appeal and the Review Board subsequently approved the settlement. See 47 CFR § 1.276. For the reasons stated in SL Communications, Inc. v. FCC, 168 F.3d 1354 (D.C. Cir. 1999), the Review Board would not have approved a payment of $850,000 to SBB had SBB been disqualified under the real-party-in-interest issue.

171. The SBB real-party-in-interest issue in Religious Broadcasting was fully resolved. The responses to Question 7(d), as well as the Dallas Amendment, that Mr. Parker had no interest in or connection to an application which left unresolved character issues against the applicant, are, therefore, true and accurate. However, even if one were to apply a highly

technical, legalistic (but incorrect) analysis that the settlement prevented the real-party-in-interest issue from being fully "resolved," there is still no basis for inferring an intent to deceive by Parker. Clearly, both Parker and his counsel viewed the Religious Broadcasting case as having been resolved favorably with respect to Parker's qualifications.

3. The Record Does Not Support A Finding Of Intent To Deceive.

172. During the late 1980's and early 1990's, Reading and other companies in which Mr. Parker had an interest generally used the Sidley Attorneys, including Bob Beizer, Clark Wadlow, Paula Friedman and William Andrle, as communications counsel. [Parker Testimony, ¶ 6 (Reading Ex. 46), Tr. 1896:4-1899:15; Wadlow Testimony, Tr. 1797:25-1803:3; Friedman Testimony, Tr. 2103:1-23] The Sidley Attorneys were aware of the Mt. Baker and Religious Broadcasting cases and, in fact, represented Inland Empire Television, another applicant in the Religious Broadcasting case. [Parker Testimony, ¶ 7 (Reading Ex. 46), Tr. 1941:19-1942:3, 1950:5-7; Wadlow Testimony, Tr. 1812:4-12, 1858:2-22] The Sidley Attorneys advised Mr. Parker that neither the Mt. Baker proceeding nor the Religious Broadcasting proceeding raised any character issues as to his qualifications to hold Commission licenses. [Parker Testimony, ¶¶ 7-8 (Reading Ex. 46), Tr. 2007:20-2008:17, 2012:20-2013:1, 2024:13-2025:14; Wadlow Testimony, Tr.

1806:10-24, 1830:15-21, 1854:23-1855:16; Letter from Clark Wadlow dated February 18, 1991 (Reading Ex. 46, Attachment D)]

173. Specifically, with respect to the Religious Broadcasting proceeding, attorney Wadlow advised Parker, in writing, that the case did not present questions as to Parker's qualifications. [Parker Testimony, ¶ 7 (Reading Ex. 46), Letter from Clark Wadlow dated February 18, 1991 (Reading Ex. 46, Attachment D); Wadlow Testimony, Tr. 1806:10-24, 1830:15-21, 1854:23-1855:16] Mr. Parker believes that he requested this letter in response to someone's questions as to his qualifications in connection with Reading's efforts to emerge from bankruptcy. [Parker Testimony, ¶ 7 (Reading Ex. 46), Tr. 2000:1-2003:20; see also Wadlow Testimony, Tr. 1865:25-1866:24] Without question, this letter was prepared for independent business purposes, and not in connection with any FCC application. [Parker Testimony, Tr. 2016:11-2019:13, 2024:13-2026:4] In addition to what is indicated in his letter, attorney Wadlow orally advised Parker that the Review Board's decision dealt only with SBB's comparative qualifications and did not hold SBB to be disqualified. [Parker Testimony, ¶ 8 (Reading Ex. 46), 1992:24-1993:7, 1996:5-11, 2024:13-2025:14] At no time, either before or after his February 18, 1991, letter to Parker, did Wadlow ever advise Parker to the contrary (i.e., that the Religious Broadcasting case did present questions as to Parker's qualifications). [Wadlow Testimony, Tr. 1862:9-15]

174. Parker's and Wadlow's understanding of the legal implications of Religious Broadcasting was further confirmed when the Review Board approved a settlement payment of $850,000 to SBB, because they believed that the Commission's rules did not permit a disqualified applicant to receive a settlement payment. [Parker Testimony, ¶ 8 (Reading Ex. 46), Tr. 1932:11-22, 1933:20-1934:6, 1935:17-1936:5; Religious Broadcasting, 5 FCC Rcd 6372 (Rev. Bd. 1990). (Reading Ex. 46, Attachment C); see also Wadlow Testimony, Tr. 1822:25-1823:9, 1829:19-1830:2, 1830:15-21, 1854:23-1855:16] This view was correct. See SL Communications, Inc. v. FCC, 168 F.3d 1354 (D.C. Cir. 1999).

175. The Religious Broadcasting disclosure first appeared in the Norwell Application filed July 24, 1991. [Parker Testimony, ¶ 12 (Reading Ex. 46); Norwell Application (Reading Ex. 46, Attachment E)] Parker did not draft the original language of the Religious Broadcasting disclosure. (Parker Testimony, ¶ 13 (Reading Ex. 46)] Parker believes, however, that it was written by an attorney. [Parker Testimony, ¶ 13 (Reading Ex. 46), Tr. 1952:6-17]

176. The attorneys listed on the Norwell Application were Brown, Nietert & Kaufman on behalf of Nick Maggos, the transferor, and Marvin Mercer on behalf of TIBS. [Parker Testimony, ¶ 13 (Reading Ex. 46), Tr. 1897:12-1898:18, 1950:23-1951:6; see Norwell Application (Reading Ex. 46, Attachment E); Kravetz Testimony, Tr. 2342:6-2344:18] Marvin Mercer is a

business lawyer and bankruptcy lawyer who was also representing Reading at the time. [Parker Testimony, ¶ 13 (Reading Ex. 46)] Mr. Mercer represented TIBS in the transaction with Mr. Maggos. [Parker Testimony, ¶ 13 (Reading Ex. 46)] Mr. Parker believes that it is possible that Mercer prepared the exhibit with input from the Sidley Attorneys and/or Brown, Nietert & Kaufman. [Parker Testimony, ¶ 13 (Reading Ex. 46), Tr. 1952:6-17]

177. Parker did review the Norwell Application, including the exhibit responding to Question 7, and approved it based on the prior advice he had from the Sidley Attorneys that the Religious Broadcasting proceeding did not present an issue as to his qualifications. [Parker Testimony, ¶ 13 (Reading Ex. 46), Tr. 2024:13-23] Once the description had been prepared and used in an application that was deemed acceptable by the Commission, it was used thereafter in subsequent applications, subject to editorial review. [Parker Testimony, ¶ 13 (Reading Ex. 46), Tr. 1952:6-17; see generally Friedman Testimony, Tr. 2107:5-2109:17]

178. As for the absence of any reference to Religious Broadcasting in the 1989 Applications, these applications were prepared by the Sidley Attorneys, who were aware of and involved in the Religious Broadcasting case, and Parker relied on their decision with respect to the content of the 1989 Applications. [Parker Testimony, ¶ 11, n.1 (Reading Ex. 46), Tr. 1941:15-1942:3, 1949:21-1950:22; see West Coast United Application

(Reading Ex. 46, Attachment I); Wadlow Testimony, Tr. 1856:16-1858:22, 1863:19-1865:7] The Question 7 exhibit to the West Coast United Application (Exhibit 3) was prepared by one of the Sidley Attorneys, most likely William Andrle, and reviewed by Wadlow. [Wadlow Testimony, Tr. 1863:19-1865:7] Wadlow does not recall why the West Coast United Application did not mention Religious Broadcasting. [Wadlow Testimony, Tr. 1863:19-1865:7] In any case, whether the 1989 Applications omitted the references to Religious Broadcasting as the result of oversight or because of an affirmative belief that no reference was required as of that time, Parker relied on his counsel for their preparation of applications and their judgment. [Parker Testimony, ¶ 11 n.1 (Reading Ex. 46), Tr. 1941:15-1942:3, 1942:13-20]

179. The Mt. Baker disclosure first appeared in a March 2, 1989, Form 315 application prepared by the Sidley Attorneys for West Coast United, the licensee of KWBB(TV), San Francisco, California. (Parker was an officer and director of that company.) [Parker Testimony, ¶ 11 (Reading Ex. 46), Tr. 1941:19-1942:20, 2012:20-2013:1; West Coast United Application (Reading Ex. 46, Attachment I); Wadlow Testimony, Tr. 1856:16-1858:22, 1863:19-1865:7] West Coast United relied upon the Sidley Attorneys to determine what was required to respond to that application's Question 7. [Parker Testimony, ¶ 11 (Reading Ex. 46), Tr. 1941:19-1942:20, 1949:21-1950:22] In that regard, Parker reviewed the description, but did not second-guess the attorneys' judgment about what information to provide. [Parker

Testimony, ¶ 11 (Reading Ex. 46), Tr. 1941:19-1942:20, 1949:21-1950:22] Once the narrative had been prepared and used in an application that was deemed acceptable by the Commission, the narrative was used thereafter in subsequent applications, subject to editorial review. [Parker Testimony, ¶ 11 (Reading Ex. 46), Tr. 2012:20-2013:1; see generally Friedman Testimony, Tr. 2107:5-2109:17]

180. It is of no little significance that each of the allegedly misleading descriptions at issue here involves questions of legal interpretation and judgment. The only factual representations even remotely involved were plainly, accurately, and truthfully answered – each applicant affirmatively acknowledged that it (or another party to the application) had had an interest in or been connected with "an application which ha[d] been dismissed with prejudice by the Commission" and "an application which ha[d] been denied by the Commission." [See Applications, Answers to Question 7(a & b)] It is only the descriptions of the holdings and legal implications of those Previous Decisions that are contested. In that regard, the interpretation of those Previous Decisions is fundamentally one calling for the exercise of legal skill and judgment.

181. Likewise, the decision whether to reference the Religious Broadcasting decision in the 1989 Applications (i.e., whether a description was or was not required at that time and under those circumstances), and the status of any character issues at the conclusion of the Previous Decisions

(e.g., in response to Question 7(d) and the Dallas Amendment), are also matters that arise from Mr. Parker's reliance of the advice of counsel concerning the legal effect and implications of the Previous Decisions.

182. Finally, to the extent that Adams takes issue with the specific wording of the Dallas Amendment, that wording was drafted by the attorneys at Brown, Nietert & Kaufman based upon information that had originally come from the Sidley Attorneys. [Parker Testimony, ¶ 14 (Reading Ex. 46), Tr. Tr. 1983:1-9, 2030:14-22, 2065:17-24, 2066:17-23] Thus, Parker reasonably accepted Brown, Nietert & Kaufman's drafting of the language of the amendment, which is, in any case, accurate, because no unresolved character issue was pending as of the time the SBB and Mt. Baker applications were dismissed or denied.

183. As demonstrated above, with respect to each of the representations at issue here, Parker relied on the advice of counsel to interpret the legal effect and implications of the Previous Decisions and to describe them in the exhibits to Question 7. Since decisions concerning the legal effect and implications of the Previous Decisions and the descriptions thereof call, particularly, for the exercise of legal skill and judgment, Parker's reliance on counsel's advice was clearly reasonable. See Norcom Communications Corp, 15 FCC Rcd 1826, ¶¶ 20-21 (ALJ 1999) (reliance of the advice of counsel concerning the interpretation of FCC regulations would not support a finding of intent to deceive); Fox Television Stations, Inc., 10

FCC Rcd 8452, ¶ 119 (1995) (reliance on advice of counsel concerning the interpretation of and compliance with FCC foreign ownership regulations which was "particularly appropriate" and would not support a finding of intent to deceive). Under these circumstances, it cannot be concluded that Parker's reasonable reliance on the advice of counsel as to the Previous Decisions constitutes intentional deception by Parker.

4. Commission Precedent Supports The Conclusion That Reliance On The Advice Of Counsel Is Inconsistent With An Intent To Deceive.

184. The conclusion that Parker's reasonable reliance on the legal advice of counsel will not support a lack of candor finding is consistent with the Commission's past practice, policy, and precedent. Thus, for example, in Roy M. Speer, the Commission found that the good faith reliance on a conclusion of law, even if the conclusion is ultimately found to be incorrect and the reliance misplaced, undercut any inference of intent to deceive. Roy M. Speer, 11 FCC Rcd 18,393, ¶ 75 (1996). Similarly, in Fox Television Stations, Inc., the Commission found that the applicant's good faith reliance on counsel's advice as to a matter of law could not support a finding of deceptive intent. Fox Television Stations, Inc., 10 FCC Rcd 8452, ¶ 119 (1995).

185. Recently, in Norcom Communications Corporation, a summary decision was entered on similar circumstances. Norcom Communications Corporation, 15 FCC Rcd 1826 (ALJ 1999). There, the applicant had relied on the advice of counsel with respect to whether its management of stations owned by certain non-profit associations complied with Commission regulations. Id., ¶ 20. The ALJ stated that:

> While it is true that reliance on the advice of counsel is not a complete defense to all FCC rule violations, the agency recognized that reliance on the advice of counsel may constitute a mitigating factor when violations relating to a regulatee's character are adjudicated. For example in Fox Television Stations, Inc., the Commission found that Fox's good faith reliance of the advice of counsel involving "a complex area of the law" was an excuse to Fox's alien ownership violations. In this case, Norcom and the Associations were advised by counsel, and believed, that the formation of the Associations' stations complied with all applicable FCC regulations. In light of Commission precedent Norcom's reliance on advice of counsel is deemed to be mitigating in this case.

Id., ¶ 21. See also Abacus Broadcasting Corp., 8 FCC Rcd 5110, ¶ 12 (Rev. Bd. 1993) (and cases cited therein) ("Although the Commission is reluctant to excuse an applicant's procedural deficiencies because of the alleged malfeasance of counsel, the Commission has been equally reluctant to impute a disqualifying lack of candor to an applicant where the record shows good faith reliance on counsel." (internal citations omitted)); Gary D. Terrell, 102 FCC 2d 787, ¶ 4 (Rev. Bd. 1985) ("Carelessness and a mistake of law are entirely different from an intent to deceive.")

186. The Commission has also acknowledged that promoting an applicant's reliance on the advice of counsel serves important administrative policies. See Fox Television, 10 FCC Rcd at 8501, ¶ 119 n.68. Thus, the Commission has tried to avoid "creat[ing] an environment in which licensees are discouraged from seeking and following the advice of legal counsel." Id. Penalizing Reading here, based upon Parker's representations made on the advice of counsel, would defeat those efforts and, for all intents and purposes, compel the conclusion that Parker should have second-guessed his counsel's legal advice.

187. In this case, Parker relied on counsel's interpretation of the legal effect and implications of the Previous Decisions both with respect to the Applications and the Dallas Amendment. Parker relied on such advice in good faith and, under the circumstances, such reliance was eminently reasonable.[21] The Commission's past practice, policy, and precedent supports the conclusion that Parker's reasonable reliance on the legal advice of counsel, particularly, counsel's advice concerning matters of a legal nature, will not support a lack of candor finding.[22]

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[21] In fact, given the impressive qualifications of Mr. Parker's attorneys, not only was Mr. Parker's reliance on their advice reasonable, but it would have bordered upon foolishness for him to second-guess them.

[22] Adams may attempt to rely on authority that suggests that an applicant can be held responsible despite the advice of counsel. See RKO General, Inc. v. FCC, 670 F.2d 215, 231 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 (1982) ("[While] it is true that reliance on counsel may render a sever sanction such as disqualification too harsh in some circumstances, . . . advice of counsel cannot excuse a clear breach of duty by a licensee" (internal

5. Conclusion

188. As shown above, the evidence demonstrates a complete absence of deceptive intent by Mr. Parker that would support a lack of candor finding against him. The representations at issue provide all the information requested by the application forms and are consistent with all the Commission's requirements that can be clearly identified to an ascertainable certainty. They were made in reasonable, good faith reliance upon the advice of counsel, and, consistent with the Commission's past practice, policy, and precedent, such reliance cannot support a misrepresentation / lack of candor finding. For these reasons, Reading is qualified to remain a Commission licensee.

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quotations and citations omitted)). Such authority, which principally involves representations or omissions of factual matters that the licensee would have clearly recognized as being incorrect, is clearly distinct from the cases involving representations on advice concerning matters of a legal nature, e.g., interpretations as to a regulation or, as here, the legal effects of an administrative adjudication.

C. Abuse Of Process Issue Against Adams – Phase III

1. Legal Standard Applicable to Abuse of Process

189. "Abuse of process is a broad concept that includes the use of a Commission process to achieve a result that the process was not intended to achieve or to use that process to subvert the purpose the process was intended to achieve." Commercial Realty St. Pete, Inc., 15 FCC Rcd 7057, ¶ 2, n. 10 (1999); see also High Plains Wireless, L.P., 15 FCC Rcd 4620, ¶ 9 (2000); Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuse of the Renewal Process [hereinafter Prevention of Abuse of the Renewal Process], 4 FCC Rcd 4780, ¶ 1, n. 2 (1989). In this instance, the "process" is the Commission's comparative renewal application process, the intended purpose of which is to acquire a broadcast license. See Prevention of Abuse of the Renewal Process, 4 FCC Rcd at ¶¶ 11, 26.

> Abuse of the renewal process hurts the public interest in several ways. Incumbent licensees are required to expend considerable amounts of money to defend against and pay off challengers, including those who are unfunded and have no real intention of owning or operating a station. Moreover, the staff and management of the incumbent are forced to spend considerable funds as well as time and effort opposing challenges to license renewals. The expenditure of such resources that might have been devoted to programming and

> other services, to defend against an abusive challenger is inefficient and wasteful. Non bona fide challengers may also discourage bona fide competing applicants and unnecessarily drain Commission resources.

Id., ¶ 22.

190. A determination that an applicant abused the comparative renewal process requires a finding that the filing of the application was motivated by an improper purpose -- i.e., that the applicant undertook the process with an intention *other* than to acquire the broadcast license. See WWOR-TV, Inc., 7 FCC Rcd 636, ¶ 25 (1992), aff'd sub nom. Garden State Broadcasting, L.P. v. FCC, 996 F.2d 386 (D.C. Cir. 1993); see also K.O. Communications, Inc., 14 FCC Rcd 8490, ¶ 23 (1998); Prevention of Abuse of the Renewal Process, 4 FCC Rcd at ¶¶ 11, 26. Thus, for example, an applicant abuses the Commission's comparative renewal process by filing an application for the purpose of reaching a settlement for the payment of money, the transfer of assets, or for any other thing of value. See K.O. Communications, Inc., 14 FCC Rcd 8490, ¶ 23; WWOR-TV, Inc., 7 FCC Rcd 636, ¶ 42; Prevention of Abuse of the Renewal Process, 4 FCC Rcd at ¶¶ 11, 26; see also 47 U.S.C. § 311(d).

191. Even when an applicant intends to construct and operate the proposed station, the application is considered an abuse of process if an improper motive also exists. See Millar v. FCC, 707 F.2d 1530, 1535 n.7, (D.C. Cir. 1983); Capitol Broadcasting Co., 30 FCC 1, 2, 3 (1961); Blue Ridge Mt. Broadcasting Co., 37 FCC 791, 800 (Rev. Bd. 1964), rev. denied, FCC 65-5

(Jan. 6, 1965); aff'd sub nom. Garden County Broadcasting Co. v. FCC, 6 RR 2d 2044 (D.C. Cir. 1965) (memorandum opinion). Accordingly, an abuse of process exists where there is a mixed motive in which part of the applicant's underlying purpose is something other than to construct and operate the proposed station.

192. Filing for the purpose of reaching a settlement is but one example of an abuse of the comparative renewal process. As noted above, the abuse of process concept is broad and includes the use of the comparative renewal process with *any* intent other than a bona fide intent to own and operate the broadcast station for which its seeks to acquire the license at issue. WWOR-TV, Inc., 7 FCC Rcd ¶ 25; see also K.O. Communications, Inc., 14 FCC Rcd 8490, ¶ 23 (1998); Prevention of Abuse of the Renewal Process, 4 FCC Rcd at ¶¶ 11, 26. As demonstrated below, when it filed its application, Adams did not have a bona fide intent to own and operate a broadcast television station on Channel 51 in Reading, Pennsylvania. Even by Adams' own admissions, part of its motivation was improper (i.e., seeking a precedent against home shopping programming). Adams' application was, therefore, an abuse of the Commission's comparative renewal application process and must be denied. WWOR-TV, Inc., 7 FCC Rcd at ¶ 42 (abuse of the comparative renewal process warrants denial of the application on basic qualification issues).

2. Adams' Application Was Not Filed With A Bona Fide Intent To Own And Operate A Broadcast Television Station On Channel 51 In Reading, Pennsylvania.

193. One of the principal cases on the issue of abuse of the comparative renewal process is WWOR-TV, Inc., 7 FCC Rcd 636 (1992), aff'd sub nom. Garden State Broadcasting, L.P. v. FCC, 996 F.2d 386 (D.C. Cir. 1993) ("Garden State"). In that case the Commission found two factors to be "especially probative" as indications that the challenger had not filed with the intention of acquiring, owning, and operating the television station at issue: first, the Commission found that the challenging applicant's stated reason for filing its application "was at best without credibility and at worst false and misleading" and, second, the remaining evidence of the challenging applicant's purpose did not demonstrate a primary interest in owning the television station. Garden State, 996 F.2d at 391; see 7 FCC Rcd at ¶ 25. "As additional evidence of intent, the FCC relied on the fact that [the principals of the challenging applicant] formed [the challenging applicant] almost immediately after they received large payments from [a prior comparative renewal challenge] settlement." Garden State, 996 F.2d at 391; see 7 FCC Rcd at ¶ 25.

194. As in Garden State, Adams' stated reason for filing its application here is, at best, without credibility and, at worst, false and misleading. Likewise, the remaining evidence of Adams' intent does not demonstrate a primary interest in owning Channel 51 in Reading,

Pennsylvania. Finally, as in Garden State, Adams was formed for the purpose of filing a comparative renewal challenge almost immediately after its principals received large payments in settlement of their prior comparative renewal challenge of Video 44. Accordingly, Adams' comparative renewal application must be dismissed as an abuse of process.

a. Adams' stated reason for filing its application is, at best, without credibility and, at worst, false and misleading

195. Throughout this process, Adams has given inconsistent testimony about why it filed its application for Channel 51 in Reading, Pennsylvania. Initially, Adams claimed that the purpose of its application was to contest the public interest value of home shopping programming. [Gilbert Decl., ¶¶ 7-11 (Reading Ex. 24); November 22, 1999 Opposition of Adams Communications Corporation to Reading's Motion to Dismiss Adams' Application, or Alternatively, to Enlarge Issues (Abuse of Process) at 8; Gilbert Testimony, Tr. 1114:25-1115:13, 1118:2-1119:4, 1124:20-25, 1132:7-20]

196. Even though Adams knew the Commission had decided a year before Adams' application was filed that home shopping programming serves the public interest, Adams adamantly insists that it was formed "for the purpose of challenging the renewal of television stations airing home shopping programming which was not serving any local interest" and that,

through the mechanisms of the competitive renewal application process, Adams would be able to demonstrate that home shopping programming fails to serve the public interest. [Gilbert Decl., ¶¶ 7-11 (Reading Ex. 24)] In fact, in its Opposition to Reading's Motion, Adams confirmed that "Adams's principals have uniformly testified that they chose to challenge RBI's renewal because they do not and did not believe that the home shopping television format serves the public interest." (November 22, 1999, Opposition of Adams Communication Corporation to Reading's Motion to Dismiss Adams' Application, or Alternatively, to Enlarge Issues (Abuse of Process) at 8.)

197. In January, in conjunction with his testimony in Phase I, Gilbert further confirmed that Adams' motivation in pursuing its challenge against Reading was to obtain a Commission precedent against the public interest value of home shopping programming. In that regard, Gilbert testified:

> The Court: Was there any consideration given, you have a very interesting group of business people there.
>
> Mr. Gilbert: Yeah.
>
> Q: Formulate some kind of syndicate, and then they can offer a sum of money to get an assignment of a channel on which the shopping was being, the home shopping was being broadcast. Would you be able to then change the name to something that would be more cerebral or –
>
> A: That wouldn't have achieved the result we were trying to achieve. We'd been successful in Monroe, in first

knocking off pay TV. Equally or more important, as it came, we stopped pornography in the United States. . . .[23]

* * *

The Court: You left [Channel] 44 in '92. The business plan, you were concerned about home shopping. Home shopping was bothering you. Your group.

Mr. Gilbert: Right.

Q: I'm asking you was there an option or could an option have been considered about buying one of those stations and taking home shopping off and turning it around. And I don't know what you answered to that, but you didn't answer my question. You said something about that wouldn't work.

A: What happens in these cases is, the problem is how to get the FCC to make a statement and do something so you would change the nature of broadcasting. If we buy – We believe home shopping network –

Q: Okay.

A: Can I answer it differently?

Q: Yes.

A: We believe Home Shopping Network is not –

Q: Wait just a second. With that answer you know, with that answer then what you're suggesting to me is that first you're saying a transfer or *assigning*[24] of a Chicago station which was specializing in home shopping would not have accomplished what you wanted to accomplish because that would not have involved the FCC and making some sort of a public interest statement as they were required to do in Video 44.

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[23] Gilbert pronounced the Monroe case to have been "highly successful from our point of view." However, if the goal was to acquire and operate a television station serving the local public interest, then the Monroe case could only be deemed a failure. [See Gilbert Testimony, Tr. 1114:25-1116:3]

[24] Errata – the original transcription reads "*of a signing.*"

A: Right.

* * *

The Court: And now you're moving on to Reading, and the route you've just outlined here. You want to go after Reading because you want the Commission to make a statement about home shopping. I'm paraphrasing what you're saying.

Mr. Gilbert: That's correct.

[Gilbert Testimony, Tr. 1114:25-1115:13, 1118:2-1119:4, 1124:20-25]

198. The ALJ memorialized Adams' sworn statement of intent shortly thereafter, finding that Gilbert "confirmed under oath that Adams' sole interest in prosecuting its application is to remove home shopping from all of broadcasting because in Adams' view it is economically impossible to provide public service broadcasting on a home shopping channel." [Memorandum Opinion and Order, FCC 00M-07, ¶ 4 (released January 20, 2000)] In fact, Mr. Gilbert even went so far as to characterize the Adams principals as public interest crusaders. [Gilbert Testimony, Tr. 1132:7-20]

199. The ALJ granted, in part, Reading's Motion and added the instant abuse of process issue to explore the question of Adams' intent in filing and prosecuting its application. [Memorandum Opinion and Order, FCC 00M-07 (released January 20, 2000)] On February 7, 2000, Adams sought leave to appeal the addition of the abuse of process issue. In denying Adams' request for leave to appeal, the ALJ indicated that the filing of an application for the purpose of obtaining a precedent against home shopping programming (i.e., a "thing of value" to Adams) might, itself, be an abuse of

the comparative renewal application process. [See Memorandum Order and Opinion, FCC 00M-19, ¶¶ 7-11 (released March 6, 2000)]

200. Only then, faced with the possibility that its initially stated position could result in an abuse of process finding against it, did Adams claim that its primary purpose in filing its application was actually to own and operate a television station in Reading, Pennsylvania, and that its previously claimed purpose of advancing the public interest by obtaining a precedent against home shopping programming was only a secondary goal. Specifically, Adams claimed that:

> Mr. Gilbert knew that, if the incumbent licensee did not receive a "renewal expectancy", a competing applicant for that license would have a reasonable chance of obtaining the license for the limited cost of preparing and successfully prosecuting the competing application. Since that cost would invariably be less than the value of the station which could be obtained through the comparative renewal process, Mr. Gilbert perceived the opportunity to file a competing application against a "home shopping" station to be both a prudent undertaking as business matter (since it could result in the obtaining of a valuable television station at a bargain price) and a salutary effort to advance the important public interest inherent in promoting substantial, locally-oriented, locally-produced programming relating to issues of local importance.

[Supplement to Answers of Adams Communication Corporation to Interrogatories, filed May 16, 2000, at 3] Gilbert affirmed that statement under penalty of perjury. [Id. at 14]

201. Both Adams' initial testimony and the revised position stated in its Supplement to its interrogatory answers are inconsistent with the

Commission's abuse of process policy. The only valid basis for filing an application is the intent to construct and operate the proposed station. A primary or secondary intent to achieve some other goal constitutes an abuse of process. See supra at ¶¶ 190-91. Accordingly, by Adams' own admissions, both prior to and after the abuse of process issue was designated, Adams' application was filed for improper purposes.

202. Apparently realizing that its "public interest" rationale was not credible and would not result in a favorable finding, Adams took a different tack at the Phase III hearing. Thus, on June 21, 2000, Gilbert testified that Adams decided to file its application "[b]ecause it was a low-cost way to obtain a television station." [Gilbert Testimony, Tr. at 2467:14-20] Adams now abandoned its prior claim to an interest in fighting home shopping programming by obtaining a Commission precedent

> Mr. Cole: Could you tell me why Adams decided to file a comparative renewal application, that is, a challenge application against an incumbent renewal licensee?
>
> Mr. Gilbert: Because it was a low-cost way to obtain a television station. It's also a way that we could do what we want to do in the broadcast industry, which was to provide some public service.
>
> Q: Could you explain the last part of your answer, please?
>
> A: Well, we assumed that we would be replacing a Home Shopping Network station and it was a strong belief of a number of the principals that Home Shopping Network was, I would say, a star in television, it had no real place either.

Q: And how would the comparative renewal process have resulted in replacing home shopping programming with something else?

A: The comparative renewal process would pit Adams against a station which presumably wasn't providing locally originated programming that dealt with community issues.

Q: Could you explain why Adams was interested in home shopping programming?

A: Adams was looking for a way to obtain a station[25] and it appeared that the kind of programming that would be most vulnerable would be Home Shopping Network programming. A number of the principals, a significant number of them actually, had viewed Home Shopping Network in Chicago and around the country, and in general, they believed that it wasn't doing what they believed to be the job of broadcast stations; that it wasn't serving the local communities as they saw it. So they felt that, in general, it would be vulnerable to a challenge.

Well, they also had followed the FCC proceeding and I had read the dissent of Commissioner Duggan and the very interesting concurring opinion of Commissioner Barrett. We also had been following the pleadings of the Media Access Project. I had been talking to Andy Schwartzman, with whom I had a long-term relationship, about what was going on, and we though that many, if not all, of the Home Shopping Network stations weren't following through on what they were supposed to be doing; that they weren't providing locally originated programming that dealt with the community problems.

[Gilbert Testimony, Tr. 2467:14-2469:5]

203. Adams' position with respect to its invocation of the comparative renewal application process has changed 180 degrees during the course of

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[25] Of course, this testimony must be considered in light of the fact that, just prior to commencing its pursuit of this comparative application process, Adams/Monroe, for all intents and purposes, had a station – Channel 44 in Chicago, Illinois. That being the case, it seems dubious, at best, that "Adams was looking for a way to obtain a station."

these proceedings, going, first, from having the sole purpose of removing home shopping programming from the airways by obtaining a Commission precedent, to having such precedent being merely a secondary interest, to being indifferent to home shopping programming except to the extent that it was a potentially vulnerable form of programming which Adams could exploit to obtain a television station license. Faced with the likelihood that its previously stated purpose of obtaining an FCC precedent against home shopping programming would result in an abuse of process finding against it, Adams changed its story. Adams' most recent pronouncement of an intent to obtain the Channel 51 broadcast license is, at best, without credibility and, at worst, false and misleading.

204. Not only is Adams' testimony internally inconsistent, it is also inconsistent with the surrounding circumstances. Thus, Adams has stated that it did not matter where in the country the station it challenged was located. [Gilbert Testimony, Tr. 1119:7-1124:9] The determinative factor in selecting which station to challenge was solely based on which "home shopping" station's license came up for renewal first. [Id.] Nor did Adams care whether the station it applied for was profitable.[26] [Gilbert Testimony,

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[26] In fact, in this regard, Gilbert, once again, emphasized Adams' interest in public service:

> Mr. Hutton: Did you ever research the income or revenue of the station WTVE before filing the Adams application?
>
> Mr. Gilbert: No. We weren't interested in that. We were a public interest case.

Tr. 1065:21-1066:3] This testimony negates Adams' claim that it was seeking a profitable opportunity to acquire a television station. Thus, if Adams' motive were to obtain a station at a bargain price, then presumably Adams would have sought the best bargain available. Yet Adams did not file its application against the most valuable station airing home shopping programming, instead it merely filed against the next home shopping station in line for license renewal, a station that had recently been in bankruptcy. [Gilbert Testimony, Tr. 1110:13-16, 1123:9-1124:2]

205. The record also shows that Adams never made any effort to even look for, let alone purchase, a television station, anywhere. [Gilbert Testimony, Tr. 2542:1-6] If Adams' true intent was to gain ownership of a television station at a bargain price, as it now claims, regardless of location or profitability, it stands to reason that it would have first, at least, tried to find a station it could simply buy outright. In the Phase I cross-examination, Gilbert claimed that buying a station had not been considered as an option because that would not have achieved the purpose of obtaining an FCC precedent against home shopping programming. [Gilbert Testimony, Tr. 1118:21-1119:4] Adams' revised explanation about its motives contradicts this initial testimony.

[Gilbert Testimony, Tr. at 1065:21-24]